

1 Court reporters affiliated with Gene S Barker and Associates, Inc , of Olympia,
2 recorded the proceedings.

3 The Board heard the testimony of sworn witnesses; reviewed all the exhibits; listened to
4 opening statements and closing arguments; and reviewed post-hearing briefs submitted by the
5 parties. Based thereon, the Board makes these:
6

7 FINDINGS OF FACT

8 I

9 George Heidgerken is a developer In 1979 he purchased in excess of 300, 55-gallon
10 drums, generally identified as containing paints, stains, glazes, and unknown contents He
11 purchased these drums at a bankruptcy auction held in Portland, Oregon, of Barker
12 Manufacturing Co , along with certain unidentified items for \$739.00 Mr. Heidgerken
13 bought these and other items for use in his building, remodeling and rehabilitation ventures.
14 At the time of purchase, Mr Heidgerken did not obtain an inventory, or any specific
15 identification or technical dates related to the materials, that was in the drums

16 II

17 Barker Manufacturing Company was a furniture company that produced furniture.

18 III

19 Mr Heidgerken first transferred the drums, in vans to a warehouse in Cornelius,
20 Oregon Subsequently, the drums were moved to a warehouse in Dundee, Oregon During
21 this period, Mr Heidgerken used some of the material from the drums in his remodeling and
22 rehabilitation projects
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IV

In 1980, Mr. Heidgerken began leasing federal lands and purchasing private lands to expand an old hot springs resort at Breitenbush, Oregon. Sometime thereafter, he moved the remaining 55-gallon drums of paint-related materials onto the Breitenbush property. Originally he left them there stored in vans. Sometime in 1984, however, he moved them from the vans onto a meadow in a location near a tributary to the Breitenbush River. During this period, Mr. Heidgerken observed the drums approximately once every 60 days. He saw that various drums were rusting, and that some were dented. He detected aromatic odors from the drums. He did not then observe any of the drums leaking.

V

Tom Fisher, Environmental Analyst for the Oregon Department of Environmental Quality, ("DEQ") wrote Mr. Heidgerken on or after August 7, 1987. Mr. Fisher was concerned "about the uncovered drums deteriorating and about the vapors. . . [he] smelled coming from them." Mr. Fisher understood that Mr. Heidgerken intended to use the drums containing lacquers and paints on cabins at Breitenbush. Mr. Fisher warned Mr. Heidgerken that these materials "threaten the Breitenbush River in a tributary that flows within a few feet of the drums." He alerted Mr. Heidgerken to the fact that the "storing of the drums in this manner is a very environmentally unsafe practice and must not continue." Finally, Mr. Fisher acknowledged Mr. Heidgerken's representation that the latter intended to construct for the drums, an enclosed storage building, with a concrete floor, by October 1, 1987. Mr. Heidgerken never responded to Mr. Fisher's letter, nor did he ever construct a storage facility on the site.

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2 VI

3 John Taylor, Environmental Analyst for the DEQ, on March 21, 1990, in response to a
4 complaint, inspected the site of the drums at Breitenbush. Mr. Taylor was concerned, because
5 the complainant alleged that a brush fire had occurred in a forested area near the drums
6 Mr. Taylor found approximately 175 drums of lacquers, stains and other paint-related
7 materials, stacked at the western edge of a meadow area

8 VII

9 Mr. Taylor observed that there was still snow on the ground. Forest litter and snow
10 was on many of the drums. The drums were stored on the ground, and on wooden pallets
11 which were in various states of disrepair. They were stacked, in many cases, two levels and in
12 some cases, three levels high. In a couple locations, boards were used to shore up the stacks.
13 Photographs taken at the time reveal that many of the drums were corroded or rusted. At least
14 two drums evidenced leakage on the sides. Strong odors were present in at least three distinct
15 areas around the drums

16 VIII

17 Some of the drums had stenciled lettering on them identifying the paint manufacturer,
18 (Sherwin Williams) the product and the date of manufacture (1975-76). Some of the drums
19 had labels warning that the drums contained aromatic hydrocarbons. There was no security
20 evident to protect the drums from any vandalism or theft.

21 IX

22 On April 12, 1990, Mr. Taylor spoke to Mr. Heidgerken by telephone.
23 Mr. Heidgerken informed him that subsequent to the former March investigation, the drums
24 had been transferred to a different location on the property.

1
2 X

3 On April 13, 1990, Mr. Taylor sent a Notice of Non-Compliance to Mr. Heidgerken
4 The notice apprised him that, in failing to immediately clean up a spill or release or threatened
5 spill, he had violated Oregon's hazardous materials regulations. Mr. Taylor warned Mr.
6 Heidgerken that, as the responsible party, he was strictly liable for any releases or threatened
7 spills or releases of hazardous materials.

8 XI

9 The DEQ requested Mr. Heidgerken to submit a written report including:

10 An explanation of what the drums contain, your intentions as to
11 use or disposal of the contents of the drums, and a timetable
12 describing projected steps and completion dates for any site
13 assessment, moving of drums, cleanup activities, or disposal of
14 drum contents. Please note that sampling of drum contents may
15 be necessary for any drums with unknown contents.

16 XII

17 DEQ requested, in addition, a detailed map of the present and future storage site for the
18 drums, as well as a detailed description of any procedures employed to transfer materials from
19 any drums that were in poor condition

20 XIII

21 DEQ cited several factors contributing to the seriousness of the matter; namely: 1) the
22 large volume of hazardous materials stored; 2) the remoteness of the storage site, precluding
23 regular monitoring; 3) the poor condition of the containers and their continued exposure to the
24 elements; and 4) the proximity of hazardous materials to surface waters. The DEQ requested a
25 written response within 14 days from Mr. Heidgerken's receipt of the notice.

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XIV

Mr. Taylor returned to the site on April 17, 1990. He corroborated that the drums had been moved from the meadow. The ground there had been scraped to a depth of about six inches. He took a soil sample there, which upon testing by one Oregon DEQ lab, was found to contain toluene, ethylbenzene, Bis(2-ethylhexyl) phthalate, and Di-n-octylphthalate.

XV

Mr. Taylor found 88 of the original 175 drums near a roadway on the property. Sixty of these were on a flatbed trailer, and 28 were on wooden pallets on the other side of the roadway. Uphill from these, in a brushy area, he located an estimated additional 173 drums. Most of these drums were stored on the ground; some were stacked in two tiers. Mr. Taylor had not seen some of these drums previously. Photographs of them reveal substantial corrosion and rusting. Mr. Taylor smelled strong odors of evaporation at both of these new sites.

XVI

Mr. Taylor took soil samples from below where two drums had recently been removed; and from liquid that had leaked from one of the drums still on site, and which leakage had solidified in the soil. Laboratory test results showed that these samples contained the same substances that were found at the meadow site.

XVII

On May 16, 1990, Mr. Heidgerken returned Mr. Taylor's phone calls from May 8 and 9, 1990. Mr. Heidgerken admitted that he had received the notice of non-compliance. He promised to provide his written response to the notice by May 24, 1990. This promise was never fulfilled.

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2 XVIII

3 On October 5, 1990, the DEQ issued to Mr. Heidgerken a formal enforcement order.
4 The order was accompanied by a cover letter which informed Mr. Heidgerken that he could be
5 assessed civil penalties of up to \$10,000 per day for each violation of the order, or of
6 Oregon's environmental laws

7 XIX

8 The enforcement order contained findings that some or all the drums contained
9 hazardous substances. For example, DEQ found that:

10 Some or all of the containers are leaking, are corroded, and/or
11 are otherwise damaged or in poor condition such that releases of
12 hazardous substances have occurred, and additional releases of
13 hazardous substances threaten to occur.

14 XX

15 The DEQ ordered the following: 1) removal of all visibly contaminated soil,
16 2) production of a detailed inventory of the drums, including; the condition of the container, a
17 description of the contents, material safety data sheets ("MSDS"), if available, a documented
18 list of all the hazardous substances in the drums, and their concentration; the proposed use of
19 the container contents; and how the containers are to be managed; 3) transfer or overpacking
20 of all drums' water leaks, corrosions, dents, missing tops or bungs, or other damage which
21 could increase the likelihood of the release of hazardous substances into the environment;
22 4) storage of any usable product in a secure facility with an impervious surface, equipped for
23 spill collection/containment and fire protection; and 5) disposal of solid waste residue in
24 accordance with DEQ's hazardous waste regulations.

XXI

Gary Lockwood, an attorney acquaintance of Mr. Heidgerken, began working for him as a coordinator of projects in June, 1990. Mr. Lockwood was not informed at that time that Mr. Heidgerken had received a non-compliance notice dated April 13, 1990.

XXII

In the summer of 1990, Mr. Lockwood contacted a consultant, Chempro, regarding the cost of disposal of the contents of the drums. He was told to get an inventory and MSDS. He was informed generally that it would cost two dollars per gallon and \$12 per gallon, respectively, to dispose of liquid and sludge. He contacted Sherwin-Williams regarding the contents of the drums. The Sherwin-Williams representative responded that if the company were supplied the numbers of the drums, it could provide the information.

XXIII

On December 7, 1990, Mr. Lockwood asked for an extension of time until January 4, 1991, to submit to DEQ, container-specific inventory information regarding the proposed disposition or use of the 260 drums at Breitenbush. On January 7, 1991, Mr. Lockwood submitted to DEQ a document entitled: "Inventory and Proposed Disposition". The document stated that Mr. Heidgerken intended to use all of the materials in the drums in a pre-cut home manufacturing facility that he was developing in Shelton, Washington. Mr. Lockwood expressed Mr. Heidgerken's intent to transfer the materials to the plant in Shelton, in April or May, 1991. Mr. Lockwood declared that the drums were presently stored in three 40-foot long storage vans, with an aisle for inspection of the drums. The inventory identified by drum, the types of materials as either a lacquer or a stain; the manufacturer and an estimate of the quantity of material in each drum. Eleven of the drums were listed as being empty. Mr. Lockwood declared that he could not meet the full requirements of the order, including

1 construction of the storage area; however, he never contacted any contractors, nor did he ever
2 apply for a building permit for a storage facility.

3 XXIV

4 The DEQ did not press for strict compliance with all the requirements of the removal
5 order, knowing that the material was to be transported to Washington. However, the DEQ did
6 express its concerns to Mr. Lockwood about the delay in Mr. Heidgerken's plans to remove
7 the drums. Mr. Taylor, in a letter dated May 2, 1991, reminded Mr. Lockwood of the
8 importance of Mr. Heidgerken's adherence to the plan for removal of the drums. The letter
9 pointed out that there are federal regulations that proscribe the speculative accumulation of
10 materials. He pointed out that the collection of these drums on the site since 1987, met the
11 criteria for speculative accumulation. Accordingly, Mr. Taylor requested that Mr. Lockwood
12 supply the following specific information: 1) the date of removal of the 249 drums of stain
13 and lacquer from the Breitenbush site; 2) the exact location and final destination of the drums,
14 3) details of the intended use of the materials, including description of the equipment that
15 would make use of the materials, and 4) the date by which all the drum contents will be used
16 at the Shelton facility.

17 XXV

18 Mr. Lockwood wrote a letter to Mr. Taylor repeating that the materials would be
19 transported to Mr. Heidgerken's plant site in Shelton. There the materials would be applied to
20 various wood and lumber products, by brush, roller, pressure sprayer or dipping. The letter
21 stated that a covered area would be designated for such applications. The area would be open
22 on two sides and would contain drying racks for the treated products. The floor of this
23 application area would have an impervious surface, to catch spills or drips, and to allow for
24 very frequent cleanup. The drums would be stored until use, in the vans in which the drums
25

26 FINAL FINDINGS OF FACT.

27 CONCLUSIONS OF LAW AND ORDER

PCHB Nos. 92-53 & 92-151

(9)

1 were then located and in which the drums were to be transported. Mr. Lockwood anticipated
2 that the drums would be removed by May 31, 1991, and estimated that the lacquer and stain
3 materials would be completely used by October 31, 1992.

4 XXVI

5 Mr. Lockwood placed shovelfuls of soil from Breitenbush, which he visually believed
6 to be contaminated, into plastic bags which he placed in a trailer. The DEQ listed and
7 prioritized the Breitenbush site on its "confirmed release list" due to the spills that had been
8 confirmed from the drums.

9 XXVII

10 Mr. Lockwood contacted the Oregon Department of Transportation about the
11 requirements for transporting the drums. He addressed two memoranda to Mr. Heidgerken
12 describing the labeling and other requirements. There were to be no leaking drums, and the
13 drums were to be stacked no more than one tier high for shipment. He prepared an envelope
14 which contained: a hazardous material booklet, flammable warning placards for the vans, and
15 flammable liquid warning cards to place on the drums. He handed the envelope to George
16 Heidgerken. The placards and signs were never placed on the vans or the drums, and the
17 drums were transported in violation of requirements of the Oregon Department of
18 Transportation.

19 XXVIII

20 Mr. Lockwood sent Mr Taylor a letter dated August 19, 1991, apprising the DEQ that
21 all of the drums had been transferred to Shelton, to be used on wood materials produced in
22 that area.

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26 FINAL FINDINGS OF FACT.

27 CONCLUSIONS OF LAW AND ORDER

PCHB Nos. 92-53 & 92-151

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XXIX

Mr. Heidgerken, sometime prior to 1991, had determined to manufacture log homes, for placement at Breitenbush. He originally considered a manufacturing site in Oregon, but he later chose a site near Aberdeen, Washington, because of its abundance of tight-grained Douglas fir. He purchased acreage and formed SGHTR, but decided to abandon the site when it was down zoned to prohibit the storage of logs. Mr. Heidgerken owned property on Hood Canal, which had the Douglas fir he wanted. He subsequently purchased a site on Craig Road, near Shelton, after he received a letter from Mason County which indicated that there were no obvious problems with use of the site for a specialty wood mill, wood chipper and log storage. This letter advised Mr. Heidgerken, however, that the site drained towards a very large wetland to the east and northeast of the property. The County official wrote that Mr Heidgerken would need to take precautions in developing the site to ensure against compromising the ecological stability of the wetland.

XXX

On December 4, 1991, Esperanza Fera, an Ecology hazardous waste inspector, received a complaint from the Mason County Health Department, regarding two open van trailers containing 55-gallon drums from which flammable vapors were emitting. The drums were described as "rusty and double stacked". The site, SE 801 Craig Road, belonged to SGHTR. That night, Ms. Fera went to the site but it was too dark to see, so she returned the next day.

XXXI

Ms. Fera visited the site on that day, December 5, and also on December 6 and 10, 1991. On the first two inspections, she was accompanied by Shari Harris-Dunning, another

1 Ecology inspector. On the third visit, she was accompanied by Suzanne Powers of the
2 Environmental Protection Agency ("EPA").

3 Ms. Fena observed two vans with drums on the first trip. The doors were open
4 There were no warning signs on the van trailers, or on the drums. She observed that more
5 than 90 of the drums were rusty and in varying stages of deterioration. She smelled a pungent
6 solvent-like odor. Ms. Fena took photographs of the site, the vans and some of the drums.
7

8 XXXII

9 Mr. Heidgerken was not at the site on December 5. However he called at 9 00 a.m
10 and conversed with Ms. Fena. Ms. Fena asked him what was in the drums. He said they
11 contained lacquers and thinners. When she asked for a complete inventory and for MSDS,
12 Mr. Heidgerken told her that if she would return the next day, he would give her the MSDS
13 and an inventory

14 XXXIII

15 Ms. Fena and Ms. Harris-Dunning returned on December 6, 1991. They met Mr.
16 Heidgerken. When Ms. Fena asked him about the MSDS and inventory, he called Mr.
17 Lockwood. She requested the documentation from him. He replied that the contents of the
18 drums were paint-related materials that were flammable. In response to Ms. Fena's question
19 about the use of these materials, Mr. Heidgerken explained that he was purchasing a
20 manufacturing plant that would use the materials on the wood. He represented that the
21 manufacturing plant would arrive in three to four months. He did not, however, supply
22 documentation or contracts to substantiate these statements. Moreover, there was still no
23 equipment on the site in September and October for either producing manufactured houses or
24 contents of the drums, at the site. Mr. Lockwood represented that documentation of the
25 contents of the drums would be forthcoming the following week.

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2 XXXIV

3 Mr. Heidgerken accompanied the Ecology inspectors to the yard. Upon their request,
4 he opened up all the vans on the site. Ms. Fera then saw a thurd van that she had not
5 observed during the earlier site visit, which had drums. The drums from this van also emitted
6 a heavy solvent odor. The drums in the first two vans were placed four across, leaving little if
7 any space between the drums for movement.

8 XXXV

9 The Ecology inspectors climbed up onto the bed of one of the trailers. They found the
10 drum lids numbered with red paint. The drums were not in sequential order. Ms Fera
11 observed that all of the drums generally were rusted. She also observed dark spillage down
12 the sides of most of the containers. She marked the date 12/6/91 on the drums closest to the
13 trailer opening

14 XXXVI

15 Prior to the next visit on December 10, Mr Lockwood had faxed to Ms. Fera the
16 drum inventory that he had given to the Oregon DEQ. Earlier Mr. Heidgerken had assured
17 Ms. Fera by phone that the MSDS should be at the site on December 10. When Ms. Fera
18 and Suzanne Power of the EPA visited the site on December 10, Mr. Heidgerken had not left
19 the MSDS.

20 XXXVII

21 The drums in the first two vans had been rearranged three across, giving some aisle
22 space for inspection. There were fewer drums in the third van. Nine drums had been placed
23 in another freight container. Ms. Fera had earlier requested Mr. Heidgerken to supply tools
24 to open some of the drums. The SGHTR employee on site declared he was ignorant of the
25 request. She then asked that one container be opened. Drum Number 34, which was opened,

1 was identified in the inventory as containing lacquer. The condition of the container had
2 deteriorated. There was evidence of past spillage down the sides of the container. This
3 spillage obstructed the stenciled lettering on the side of the barrel. The contents emitted a
4 strong solvent odor, and inside the drum was a milky white substance. SGHTR, in an August
5 1992 inventory, later identified the contents of this drum as a glaze.

6 XXXVIII

7 Approximately two percent of the drums had flammable warning labels on them, the
8 rest did not have identifying labels, except for the product codes stenciled on the sides. Ms
9 Fera observed several dented bulging, or leaking drums. There were no fire extinguishers or
10 emergency communication devices present. The property was not totally fenced and the
11 inspectors entered through an open gate.

12 XL

13 SGHTR ultimately provided Ecology with nine MSDS. These indicated that the
14 contents of the drums contained a flashpoint of less than 140 degrees Fahrenheit, which is the
15 ignitability threshold for dangerous wastes.

16 XLI

17 Ms. Fera contacted a representative of Sherwin-Williams, to inquire whether the
18 materials were a usable product. She was told that they have a shelf life of three years, and
19 that it would be difficult to determine whether the materials were usable, but that the product
20 could be usable.

21 XLII

22 Ms. Fera made a further inspection on January 6, 1992. Subsequently, she
23 recommended that the 249 drums be treated as solid waste and dangerous waste, and that an
24 enforcement action be taken under Chapter 173-303 WAC.

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XLIII

On February 2, 1992, Ecology issued an enforcement order to SGHTR. This order required SGHTR to designate, within five days of receipt of the order, the materials in the drums as dangerous wastes. The order required that within 20 days of designation, the materials be offered to an appropriate treatment, storage and disposal ("TSD") facility

XLIV

SGHTR never sought a stay of this order. On March 2, 1992, it represented that it would build a storage facility for the lacquers and stains, within 60 days.

XLV

On March 3, 1992, SGHTR gave written notice to Ecology of dangerous waste activities. The notice declared that SGHTR did not believe the contents of the drums to be dangerous waste, and that SGHTR was conducting tests to confirm that belief.

XLVI

SGHTR hired consultants from Kennedy/Jenks. Melissa Papworth, environmental consultant, admitted that when hired she was unaware of the history of the drums owned by SGHTR and the regulatory efforts that had been taken by the State of Oregon. She first saw pictures of the drums, as they were in Oregon, at the hearing before the Board. She declared that she was familiar with Washington's hazardous waste regulations. Ms. Papworth testified that her consulting firm encourages its clients to find a way to use materials (that are potentially susceptible to being classified as dangerous waste) before disposal of the materials

XLVII

Kennedy/Jenks on March 6, 1992, sampled many of the drums with a glass rod. No laboratory analysis was done of the results, nor was any documentation of the sampling provided to Ecology. However, the consultant's notes from the tests and photographs taken by

1 Ms Fera indicate that many of the drums manifested one or more of the following
2 characteristics: corrosion, rust, denting, bulging, leaking, containing sludges, or partial
3 emptiness
4

5 XLVIII

6 Ecology informed SGHTR's attorney by a letter dated March 27, that Mr. Heidgerken
7 was encouraged to produce documentation pursuant to WAC 173-303-016(7) for his claim that
8 the materials were usable wood product. Despite the request, no further documentation was
9 provided to Ecology.

10 XLIX

11 SGHTR's attorney wrote to Ecology's attorney on April 13, informing her of SGHTR's
12 plan to transfer and consolidate the contents of the drums. Ms. Fera responded in writing that
13 Ecology had, at a previous March 19 meeting, stated that the consolidation of the materials
14 would be unacceptable, because SGHTR had not established a methodology acceptable to
15 Ecology, for determining that the materials were similar. Ms Fera also commented that the
16 20 drums SGHTR proposed to purchase, would be insufficient to transfer and overpack 200,
17 55-gallon containers.

18 L

19 In an April 15, 1992, letter to Ecology, SGHTR's attorney stated that despite
20 Ecology's objection, SGHTR was going to consolidate materials on April 17 at the site, and
21 that SGHTR anticipated that Ms Fera would be present SGHTR also advised that as part of
22 an attempted settlement, it had tentatively agreed to dispose of the contents of the drums

23 LI

24 Ms. Fera arrived on April 17 at the site, to observe the transfer process.
25

26 FINAL FINDINGS OF FACT.

27 CONCLUSIONS OF LAW AND ORDER

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(16)

1 Mr. Heidgerken said the pumps that he had ordered were not available. Ms. Fena expressed
2 her concerns about the danger of Mr. Heidgerken personally lifting and transferring the
3 materials. No work was done that day. Thirteen of the drums which had been opened during
4 the March sampling, remained unsealed.

5
6 LII

7 In May, 1992, SGHTR contracted with Burlington Environmental, Inc. ("BEI") to
8 characterize and dispose of 260 paint-related drums at the site. On May 21, 1992, Mr. Mel
9 Frank, Project Supervisor for BEI was told by Mr. Heidgerken that "all he wants is the drums
10 out of here". When Mr. Frank first visited the site, he assessed the condition of the drums for
11 transportation purposes. He estimated that 95% of the drums were in poor condition.

12 LIII

13 During the third week of May, Mr. Frank laid down visqueen on a bermed area and
14 placed the drums there from the trailers. Mr. Frank worked for three or four days, but
15 ultimately abandoned the work.

16 LIV

17 Ms. Fena returned to the site on May 27. She met Mr. Frank for the first time.
18 Although Mr. Frank told her to direct all her questions to Mr. Heidgerken, it was Ms. Fena's
19 impression at that time that the disposal would take place. She observed a number of drums
20 with the sealer rings removed. She also observed one drum with a hole in it, which drum also
21 appears in an earlier Oregon, DEQ photograph.

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2 LV

3 On June 22, Ms. Feria returned to the site again. She found the condition of the drums
4 similar to that on her prior visit. The temperatures were 70-80 degrees Fahrenheit and the
5 materials were volatilizing. BEI was no longer on site. In checking later with Mr. Frank, she
6 was informed that BEI had not been paid

7 LVI

8 Ecology, on July 2, 1992, assessed SGHTR a civil penalty of \$206,000 which
9 represents \$2000 00 per day for 103 days of noncompliance, beginning on March 11, 1992
10 SGHTR was given the opportunity to mitigate the penalty to \$80,000, if full compliance with
11 the original order was achieved by July 11, 1992. SGHTR's response to the penalty and the
12 mitigation offer was an appeal of the penalty, which was filed with the Board on July 31,
13 1992

14 LVII

15 As temperatures rose, Ms. Feria became increasingly concerned over the potential fire
16 danger from the vapor build-up of the materials. On July 6, she visited the site in the
17 company of David Salzer, the Mason County Fire Marshal. She took photographs of the
18 drums on that date. The photographs revealed rust, and corrosion, bulging containers, liquid
19 pooled on the lids, paint residues, lack of aisle space and liquids and solid materials
20 consolidated from several drums. She also observed several in new containers labeled
21 "hazardous waste"

22 LVIII

23 As a result of the inspection, the Fire Marshal issued a letter to Mr. Heidgerken,
24 requiring him to come into compliance with the Uniform Fire Code. The Fire Marshal wrote
25 that, due to Mr. Heidgerken's failure to provide documentation of the contents of the barrels,

1 they were assumed to be "Class I-A Flammable Liquid". The Fire Marshal also warned that
2 Mr. Heidgerken's facility presented "a severe fire hazard as well as a potential source of major
3 groundwater contamination in the event of a fire and subsequent extinguishment efforts."
4 Accordingly, the Fire Marshal concluded, "I can assure you that my office will vigorously
5 pursue all remedies to achieve resolution of the fire safety issues."

6
7 LVIX

8 Ecology subsequently sought injunctive relief in Mason County Superior Court. The
9 court on August 7, 1992, deferred to this Board a determination of whether the materials
10 stored in the drums constitute dangerous waste. The court, however, required Mr. Heidgerken
11 to comply with the orders of the Mason County Fire Marshal.

12 LX

13 Since issuance of the injunction, Mr. Heidgerken has: transferred the materials to new
14 drums, fenced the perimeter of the site, placed water trucks on the site, created an inventory of
15 the materials in the drums, and applied for a building permit for construction of a storage
16 facility. This new inventory is the first detailed inventory of the materials. It reveals
17 numerous errors in the generalized inventory provided earlier to the Oregon DEQ and to
18 Ecology.

19 LXI

20 At the injunction hearing, Mr. Heidgerken represented that he was purchasing a plant,
21 from the Pendu Corporation. Pendu's plants manufacture logs for the construction of homes.
22 At the hearing, he presented: 1) a customer order form; 2) a check made out to Pendu in May
23 1990 for \$70,000; 3) two checks made out to Corporate Leasing Company in August and
24 October 1991, totaling \$22,000; and 4) a letter from the General Manager of Pendu to the
25 EPA criminal investigator, stating that Mr. Heidgerken had been negotiating a lease for the

1 requested equipment. The letter also advised that some of the equipment had been built and
2 was awaiting shipment upon approval of the lease.

3 LXII

4 Mr. Heidgerken, at the hearing before the Board, testified that he entered into
5 negotiations with Pendu, for acquisition of the plant, in 1988-89. In a letter dated October 12,
6 1989, Pendu thanked Mr. Heidgerken for his interest in Pendu's products. Pendu sent him at
7 that time a videotape of the Pendu sawmill in operation, and encouraged him to review and
8 copy the tape and pass it on to others who might benefit from it. Mr. Heidgerken estimated
9 the cost of the plant to be \$1,017,000. He acknowledged that he had been unable to finance
10 the purchase himself.

11 LXIII

12 Mr. Heidgerken did not introduce any signed contract for purchase of the plant. He
13 did, however, submit a purchase order for it. He admitted that the leasing company had not
14 yet paid anything to Pendu for the plant. He also acknowledged that the plant does not include
15 any equipment for the application of stains or coatings. The materials are designed to be
16 applied by differing processes depending on the material. There is no known market for these
17 materials. Approximately one-third of the materials in the drums are capable of use without
18 reconstitution. Moreover, prior to their use on wood buildings, or cabinetry, the expert
19 witnesses recommended that the materials be subjected to various tests, including flame-spread
20 potential and durability to determine if they are good enough for a specific use. In some
21 cases, the cost of reconstituting these materials would exceed the cost of new materials.

22 LXIV

23 Mr. Curtus Bailey, a paint expert hired by Mr. Heidgerken, went through all the
24 drums, using an air mixer. He discovered that about 25% of the drums had corrosion on the
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26 FINAL FINDINGS OF FACT.

27 CONCLUSIONS OF LAW AND ORDER

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(20)

1 inside He concluded that material from a number of the drums should be disposed of as
2 waste He participated in consolidating these materials into the new drums.

3
4 LXV

5 Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.
6 From these Findings of Fact, the Board issues these:

7 CONCLUSIONS OF LAW

8 I

9 The Board has jurisdiction over these parties and the subject matter. RCW
10 43 21B 300, 310; Chapter 70.105 RCW.

11 II

12 Ecology has the initial burden of proof in this appeal of a regulatory order and a civil
13 penalty that the paint-related materials constitute solid and dangerous waste.
14 WAC 371-08-183(3) SGHTR has the burden of proving its materials are exempt from these
15 definitions. The Board decides the matter de novo. WAC 371-08-183(2).

16 III

17 The materials contained in the original 260 drums constitute both "solid waste" and
18 "dangerous waste" as those terms are used in chapter 173-303 WAC.

19 IV

20 Ecology is the state agency designated to implement the Federal Resource Conservation
21 and Recovery Act ("RCRA," 42 USC. Sec. 6901 et seq). RCW 70.105.130(1).

22 V

23 Pursuant to RCW 70 105.130(2)(e), Ecology has adopted regulations (Washington
24 State Dangerous Waste Regulations (Chapter 173-303 WAC)), which implement both the State
25 Hazardous Waste Management Act, and the state's requirements under RCRA. These state

1 regulations, contain definitions of solid and dangerous waste, which definitions correspond to
2 the definitions of solid and hazardous waste, respectively, contained in federal regulations
3 adopted by EPA pursuant to RCRA. See 40 CFR 261.1, .2.
4

5 VI

6 RCW 75.105 010(5) defines dangerous wastes as:

7 any discarded, useless, unwanted, or abandoned substances,
8 including but not limited to certain pesticides, or any residues or
9 containers of such substances which are disposed of in such
10 quantity or concentration as to pose a substantial present or
11 potential hazard to human health, wildlife, or the environment
12 because such wastes or constituents or combinations of such
13 wastes:

14 (a) have short-lived toxic properties that may cause death,
15 injury, or illness or have anugenic, teratogenic, or carcinogenic
16 properties; or

17 (b) are corrosive, explosive, flammable, or may generate
18 pressure through decomposition or other means
19

20 VII

21 Ecology's regulations define solid waste as" "any discarded material . . ."

22 WAC 173-303-011(3)(a). Under WAC 173-303-016(3)(b):

23 A discarded material is any material which is:

24 (i) abandoned, as explained in subsection (4) of this section;
25

26 VIII

27 WAC 173-303-016(4) characterizes materials as abandoned when

(4) they are abandoned by being.

...
(c) accumulated, stored, or treated (but not recycled) before or
in lieu of being abandoned by being disposed of, burned, or
incinerated.

IX

The regulations also define solid wastes as follows in WAC 173-303-016(5):

Materials are solid wastes if they are recycled - or accumulated, stored, or treated before recycling - as specified in (a) through (d) of this subsection.

(d)(i) Accumulated speculatively . . .

(ii) A material is accumulated speculatively if it is accumulated before being recycled. A material is not accumulated speculatively, however if the person accumulating it can show that the material is potentially recyclable and has a feasible means of being recycled and that during the calendar's year (commencing on January 1), the amount of material that is recycled or transferred to a different site for recycling, equals at least seventy-five percent by weight or volume of the amount of that material accumulated at the beginning of the period. . .

X

These regulations do not redefine what is in the statute, but rather fill in the gaps of a generalized statutory scheme. Hama Hama v. Shorelines Hearings Board, 85 Wn.2d 441, 448, 536 P.2d 157 (1975).

XI

The regulations are designed to add objectivity to the determination of how materials are handled, where an owner or handler claims the materials are not accumulated, stored or treated in lieu of being abandoned by disposal, burning, or incineration. WAC 173-303-016(7) thus provides the following criteria for measuring an owner's claim that materials are not solid waste.

(7) Documentation of claims that materials are not solid wastes or are conditionally exempt from regulation. Respondents in actions to enforce regulations implementing chapter 70.105 RCW who raise a claim that a certain material is not a solid waste, or is

1 conditionally exempt from regulation, must demonstrate that
2 there is a known market or disposition for the material, and that
3 they meet the terms of the exclusion of exemption. In doing so,
4 they must provide appropriate documentation (such as contracts
5 showing that second person uses the material as an ingredient in
6 a production process) to demonstrate that the material is not a
7 waste, or is exempt from regulation. In addition, owners or
8 operators of facilities claiming that they actually are recycling
9 materials must show that they have the necessary equipment to do
10 so.

11 The equivalent RCRA regulation is 40 CFR 261.2(f).

12 XII

13 WAC 173-303-016(1)(b)(i) states that:

14 The definition of solid waste contained in this section applies
15 only to wastes that are also dangerous for purposes of the
16 regulation implementing chapter 70.105 RCW. For example, it
17 does not apply to materials (such as nondangerous scrap paper,
18 textiles or rubber) that are not otherwise dangerous wastes and
19 than are recycled.

20 This criterion is met here because the paint materials have a flash point of less than 140
21 degrees Fahrenheit, which is the threshold for dangerous wastes.

22 WAC 173-303-090(1)(5)(a)(i).

23 XIII

24 The regulations governing solid and dangerous wastes also consider the potential danger
25 to the environment, as a factor in determining the designation of such materials.

26 WAC 173-303-016(1)(b)(ii) provides in pertinent part:

27 Within the constraints of chapter 70.105 RCW, this shall include
but not be limited to any material that: Is accumulated, used,
reused, or handled in a manner that poses a threat to public health
or the environment; or, due to the dangerous constituents in it,

1 when used or reused would pose a threat to public health or the
2 environment.

3 XIV

4 Mr. Heidgerken contends that the above-cited regulations exceed the statutory authority
5 of Ecology. The Board has the jurisdiction to determine, in adjudications involving Ecology
6 decisions (over which it has exclusive jurisdiction), whether Ecology's regulations, as applied,
7 are within its statutory authority. D/O Center v. Department of Ecology, 119 Wn.2d 761,
8 774-77, _____ P.2d _____ (1992).

9 XV

10 RCW 70.105.130(2)(e) grants to Ecology specific rule-making authority to promulgate
11 regulations to.

12 Establish standards for the safe transport, treatment, storage, and
13 disposal of dangerous wastes as may be necessary to protect
human health and the environment.

14 Ecology also has the authority under RCW 70.95.060, to adopt minimal functional standards
15 for solid waste handling. Finally, Ecology has general authority to adopt regulations
16 necessary and appropriate to carry out its duties which are prescribed by law. RCW
17 43.21A.064(9); .080.

18 XVI

19
20 Where the Legislature has specifically delegated to an
21 administrator the power to make regulations, such regulations are
22 presumed valid. The burden of overcoming this presumption lies
23 on the challenger. Judicial review is limited to a determination
of whether the regulation in question is reasonably consistent with
the statute being implemented.

1 Omega Nat'l Ins. Co. v. Marquardt, 115 Wn.2d 416, 423, 799 P.2d 235 (1990).¹

2
3 XVII

4 Mr. Heidgerken has failed to demonstrate that the Ecology regulations governing the
5 handling of solid and dangerous wastes are not reasonably consistent with the state and federal
6 laws governing solid, hazardous and dangerous wastes. These regulations do not conflict with
7 the statutory terms "discarded, useless, unwanted or abandoned" substances contained in RCW
8 70.105.010(5). Rather, these regulations fulfill the purpose of the Legislature which decreed
9 that

10 Strong and effective enforcement of federal and state hazardous
11 waste laws and regulations is essential to protect the public health
12 and the environment.

13 RCW 70.105.005(4).

14 XVIII

15 Ecology's regulations do not define the statutory terms, but rather establish criteria for
16 determining whether materials are to be deemed dangerous wastes. Mr. Heidgerken has let
17 these materials accumulate on his property, essentially unused for over 10 years, most of the
18 time out-of-doors. To this date he has provided no objective documentation that there is a
19 known market for these materials, or that they are being used, or are contracted for use in an
20 existing production process. His actions, which exhibit a casual disregard for these materials
21 and their potential impacts on the environment, belie his contention that they constitute a
22 usable product.

23 ¹ A broader standard of review may be applicable where one is challenging, under RCW 34.05.570(2)(c),
24 whether the regulation "could not conceivably have been the product of a rational decision-maker." See Chamber
25 of Commerce v. Department of Fisheries, 119 Wn.2d 464, ____ P.2d ____ (1992) (5-4 decision). Mr.
26 Heidgerken has not raised this issue. The burden of proving that the regulation is invalid under this test is on the
27 party challenging the regulation. In any event we believe that the challenged regulation satisfies the test of
Chamber of Commerce

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XIX

Mr. Heidgerken's response to the substance of regulatory agency concerns has been minimal and reluctant. He gave no response to the Oregon DEQ's initial concern, in 1987, about the deterioration of the drums, and the unprotected emission of vapors. Three years later, when the Oregon DEQ issued an enforcement order, Mr. Heidgerken's response was to move the drums to the State of Washington. Once here, they were discovered, as a result of a complaint, which apparently originated from a disgruntled employee.

XX

Finally in Washington, it was only after Mr. Heidgerken had been ordered to remove the drums, and assessed a civil penalty, that he made any significant efforts to contain the materials.

XXI

We conclude that the materials in the drums constitute discarded and abandoned materials under WAC 173-303-016(3)(a); (b)(i); and (4)(c). Because they have not been significantly recycled, we conclude that these materials have been accumulated speculatively under WAC 173-303-016(5)(d)(i) and (ii). Mr. Heidgerken has also failed to provide adequate documentation that he or anyone uses the materials as an ingredient in a production process, under WAC 173-303-016(7). Accordingly, these paint-related materials are not exempt from classification as solid and dangerous waste under Chapter 173-303 WAC.

XXII

Mr. Heidgerken contends that WAC 173-303-016, improperly shifts the burden of proof to him. There has not been a shifting of the burden of proof. There are two distinct burdens of proof in this case. Here, Ecology has the burden of proof that the materials constitute solid and dangerous waste. Ecology established an extensive factual history of

1 Mr. Heidgerken's general disregard for and abandonment of materials. Mr. Heidgerken had
2 the burden of producing evidence to counter Ecology's prima facie case. See, Gillingham v.
3 Phelps, 11 Wn. 2d 492, 501, 119 P.2d 914 (1941). He never did document that there was
4 either a market for these materials, or that they were being used in a production process.
5

6 XXIII

7 A party who claims the benefit of an exception to a broad remedial statutory scheme,
8 has the burden of proving that it falls within the scope of an exception. SEC v. Ralston Purina
9 Co., 346 U.S. 119, 126, 97 L.Ed. 1494, 73 S.Ct. 981 (1953); American Petroleum v. EPA,
10 661 F.2d 340, 352, 354 (5th Cir. 1982). Similarly, exceptions to environmental laws, (which
11 laws are to be liberally construed because of the overlay of the State Environmental Policy
12 Act), are to be narrowly confined. English Bay v. Island County, 89 W. 2d 16, 20, 528 P.2d
13 783 (1977); Mead School Dist. v. Mead Education, 85 Wn.2d 140, 145, 530 P.2d 302 (1975)
14 Thus Mr. Heidgerken bore the burden of establishing that his treatment of the materials was
15 exempt from regulation.

16 XXIV

17 The Board lacks authority to rule on constitutional issues. Yakima Clean Air v.
18 Glascam Builders, 85 Wn.2d 255, 257, 534 P.2d 33 (1975). Therefore, Mr. Heidgerken's
19 contentions that: 1) the alleged shifting of proof violates procedural due process, and 2) WAC
20 173-303-616(b)(11) is void for vagueness, are constitutional challenges beyond the purview of
21 this Board.²
22
23

24 ² We note that the defect of vagueness allegedly contained in WAC 173-303-016(b)(11), also exists in 40 CFR
25 261.1(2)(i)(11), upon which the state regulation is modeled.

1
2 XXV

3 RCW 70.105.080(1) directs that

4 Every person who fails to comply with any provision of this
5 chapter or of the rules adopted thereunder shall be subjected to a
6 penalty in an amount of not more than ten thousand dollars per
7 day for each such violation. Each and every violation shall be a
8 separate and distinct offense. In case of continuing violation,
9 every day's continuance shall be a separate and distinct violation.

10 RCW 70.105.080(2) references the penalty procedures of RCW 43.21B.300.

11 XXVI

12 RCW 43.21B.300(1) allows the penalized party to seek remission or mitigation of a
13 penalty from Ecology. Ecology in its civil penalty order, offered to mitigate the civil penalty
14 it had assessed of \$206,000, to \$80,000. Ecology assessed the penalty at a rate of \$2,000 per
15 day for 103 days of violation. It could have assessed a penalty of \$1,030,000, for these days
16 Mr. Heidgerken, however, declined to take advantage of the mitigation process.

17 XXVII

18 The Board generally considers three factors in reviewing the appropriateness of a civil
19 penalty. These are: 1) the nature of the violation, 2) the prior behavior of the violator, and 3)
20 actions taken after the violation to solve the problems.

21 XXVIII

22 The over two hundred barrels of paint-related materials are highly volatile. They
23 actually spilled on the ground in Oregon, triggering placement of the site on a prioritized list
24 for cleanup. There was sufficient concern for fire danger in Shelton, that the Mason County
25 Superior Court issued an injunction against Mr. Heidgerken and SGHTR. The EPA has been

1 involved in investigation of Mr. Heidgerken's potential violation of federal law. Ecology
2 assessed the penalty at 20% of the maximum.
3

4 XXIX

5 Mr. Heidgerken has shown a consistent pattern of obstruction of state regulatory efforts
6 to remove the hazard. Had the State of Washington not been apprised of the location of the
7 materials, we have no reason to believe that Mr. Heidgerken still would not be treating these
8 materials with a disregard for their environmental impact.

9 XXX

10 Mr. Heidgerken, after the assessment of a civil penalty, began to protect the materials
11 from volatilization, and eliminated the corroded drums. He consolidated what he considered
12 unusable materials into drums labeled hazardous waste. Since the injunction, he has fenced off
13 his property. We view these efforts as some progress towards compliance with the applicable
14 environmental regulations. However, he has failed to make any significant progress towards
15 use of the materials. On balance, we believe, that Mr. Heidgerken has historically taken a
16 resistant stance towards compliance with state regulations of these materials. If indeed he
17 intended to use them, we are left wondering why he has taken such a minimal effort to protect
18 them. We are mindful that the Legislature's call for strong and effective enforcement of this
19 State's hazardous waste laws. Under the circumstances, the \$206,000 penalty is appropriate.

20 XXXI

21 Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.
22 From the foregoing, the Board issues this:
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ORDER


1) Ecology Order No. DE 92HS-S013, requiring SGHTR to take certain actions regarding the paint-related materials brought from Oregon, including designating them as dangerous wastes and disposing of them at a permitted treatment, storage or disposal facility, is affirmed.

2) Ecology Notice of Penalty Incurred and Due, No. DE 92HS-S207, to SGHTR, in the amount of \$206,000, is affirmed.

DONE this 3rd day of December, 1992.

POLLUTION CONTROL HEARINGS BOARD


ROBERT V. JENSEN, Attorney Member
Presiding


HAROLD S. ZIMMERMAN, Chairman

P92-53F